

2009

Check City, Inc. v. L and T Enterprises : Brief of Appellant

Utah Court of Appeals

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CHECK CITY, INC., a Utah Corporation,
Plaintiffs/Counterclaim Defendant/
Appellee,
vs.
L&T ENTERPRISES, a Utah Corporation
Defendant/Counterclaimant/Appellant.

**ON APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH,
HONORABLE FRED D. HOWARD PRESIDING**

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to *Utah Code Ann.* § 78A-4-103(2)(j).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in concluding that Appellant owed Appellee a duty of care under *Utah Code Ann.* § 70A-3-406, thereby giving rise to a cause of action against the maker of joint checks by one who paid on the checks without the endorsements of both co-payees.

This issue was preserved for appeal throughout the course of the trial, in the pretrial briefing and at closing arguments. (R. 102, 148, 431, 489, Trial Transcript - R. 529, (hereafter “Tr.”) at 32, 132-33, 140, 143).¹

2. Whether the trial court erred in concluding that Appellant’s negligence was greater than that of Appellee and was the proximate cause for Appellee’s claimed damages.

This issue was preserved for appeal throughout the course of the trial, in the pretrial briefing and at closing arguments. (R. 139, 487-86, Tr. 132-33, 138-39).

3. Whether the trial court erred in concluding that Appellant failed to present any “record evidence” to raise a genuine issue of material fact which was in dispute.

This issue was preserved for appeal, in the pretrial motions and pleadings related

¹ Citations to the Record are based on Appellant’s understanding that the Record pages referenced in the Clerk’s Certificate indicate the first page of the document and are in a descending numerical order beginning at the referenced page number.

to the parties' respective Motions for Summary Judgment. (R. 65, 296, 326).

STANDARD OF REVIEW

The determination of whether a legal duty exists falls to the court. It is a purely legal question and involves the examination of the legal relationships between the parties. *Davencourt Homeowners Association v. Davencourt at Pilgrims Landing, L.C.*, 2009 UT 65, ¶ 27 (Utah 2009), *see also Loveland v. Orem City Corp.*, 746 P.2d 763 (Utah 1987). The appellate court reviews this issue for correctness. *Madsen v. Washington Mutual Bank*, 2008 UT 69, ¶ 19, 199 P.3d 900 (Utah 2008) (“We review questions of law for correctness, giving no deference to the ruling of the court below”).

The trial court's conclusion that Appellant was 51% negligent and that such negligence was the proximate cause of Appellee's damages is a “legal conclusion based on various factors in addition to an actual cause - effect relationship.” *Bennion v. LeGrand Johnson Const. Co.*, 701 P.2d 1078, 1083 (Utah 1985). As a legal conclusion, the appellate court reviews this issue for correctness. *Madsen* at ¶ 19.

As to the trial court's summary judgment dismissing Appellant's claim against Appellee, if there is any doubt or uncertainty concerning questions of fact, the doubt should be resolved in favor of the [non-moving] party. Thus, the court must evaluate all the evidence and all reasonable inferences fairly drawn from the evidence in the light most favorable to the party opposing summary judgment. *Wilkinson v. Union Pacific Railroad Co.*, 975 P.2d 464, 465 (Utah 1998). “A district court is precluded from granting summary judgment if the facts shown by the evidence on a summary judgment motion support more than one plausible but conflicting inference on a pivotal issue in the

case...particularly if the issue turns on credibility....”*Uintah Basin Medical Center v. Hardy*, 179 P.3d 786, 790 (Utah 2008). Further, "summary judgment is appropriate in negligence cases only in the clearest instances." *Trujillo v. Utah Dept. of Transp.*, 1999 UT App 227, ¶12, 986 P.2d 752, (Utah Ct. App. 1999) (quoting *Nelson v. Salt Lake City*, 919 P.2d 568, 571 (Utah 1996)).

CONSTITUTIONAL OR STATUTORY PROVISIONS

Applicable statutory provisions include: *Utah Code Ann.* § 70A-3-406 and *Utah Code Ann.* § 70A-3-110(4).²

STATEMENT OF THE CASE

Nature of the Case. This is an appeal from a decision by the Honorable Fred D. Howard in which the trial court concluded that Appellant, as the maker of six “joint checks,” owed a legal duty of care to Appellee under *Utah Code Ann.* § 70A-3-406, even though Appellee accepted and cashed the joint checks without the required endorsements. Appellant is a general contractor and the legally recognized standard within the industry is for general contractors to pay subcontractors and materialmen through the issuance of joint checks. Appellant issued six joint checks in the total amount of \$19,308.12 (hereinafter the “Joint Checks”), payable to a subcontractor and the subcontractor’s materialman. The subcontractor presented the Joint Checks to the Appellee without the materialman’s endorsement. The Appellee cashed the Joint Checks and withheld its fee

² In accordance with Rule 24(a)(6) *Utah Rules of Appellate Procedure*, the text of the referenced statutory provisions are provided in the Addendum to Appellant’s Brief (attached hereto).

from the proceeds. As a result of the materialman's missing endorsement, the Joint Checks were returned to Appellee's bank. Appellant was thereafter required to issue additional payments directly to the materialman in order to obtain the necessary lien releases.

Course of Proceedings. This action was precipitated by the filing of a complaint by Appellee to recover the proceeds credited from Appellee's bank account after the Joint Checks were dishonored and returned by Appellant's bank for improper endorsement. (R. 8). The subcontractor filed for relief under Chapter 7 of the United States Bankruptcy Code and was not a party in this action. (R. 492). Appellee's claims against Appellant were based on negligence; statutory "right of payment" under *Utah Code Ann.* § 70A-3-403; unjust enrichment; "monies due and owing"; and "passing a bad check." (R. 85). Appellant counterclaimed against the Appellee claiming that the Appellee was negligent in failing to observe reasonable commercial standards by ensuring that the Joint Checks contained the requisite and proper endorsements. (R. 65).

Disposition Below. Early in the case Appellant filed a motion for summary judgment against the Appellee and argued that Appellant owed Appellee no duty of care and that as a matter of law, Appellee had no cause of action against Appellant. (R. 102, 148). The District Court denied Appellant's motion for summary judgment except that it dismissed Appellee's fifth cause of action asserting that Appellant had passed "bad checks." (R. 248, 258).

Appellee filed a motion for summary judgment on Appellant's counterclaim. (R. 264, 276). The trial court ruled that Appellant failed to present any "record evidence" to

support the cause of action against Appellee. (R. 334). The trial court granted summary judgment to Appellee, thereby dismissing Appellant's counterclaim. (R. 334).³

On May 27, 2009, a half-day trial was conducted by the trial court on Appellee's various causes of action. At the beginning of the trial, Appellant argued a previously filed Motion in Limine and again asserted that no common-law or statutory duty was owed by Appellant to Appellee. (R. 447, 492; Tr. 8-9, 26-27, 30). The trial court appeared to agree and determined that the only issue to be tried related to the Appellee's claim that a portion of the Joint Check amounts were in fact owed to the Subcontractor at the time Check City cashed them. (Tr. 44). Based on the trial court's determination, a limited evidentiary presentation was made by both parties related to the specific issue of what amount was owed to the Subcontractor from the amounts paid by the Joint Checks.

As to the issue of whether the Subcontractor was entitled to some portion of the Joint Checks, the trial court ruled in Appellant's favor (Tr. 142-43). However, the trial court concluded that under *Utah Code Ann.* § 70A-3-406, Appellant owed Appellee a duty of care with respect to the Joint Checks and had breached this duty by failing to "escrow[] the money or take[] other remedial steps." (Tr. 143-44). Although the trial court also concluded that Check City had failed in its "obligation to attempt to negotiate the [Joint Check's] in accordance to [sic] the draft order," the trial court nevertheless granted judgment in favor of Appellee for 50% of the face amount of four Joint Checks. (Tr. 144). Subsequent to its initial ruling, the trial court entered an "Amended Ruling"

³ No "Order" formally dismissing Appellant's Counterclaim was entered by the Court.

wherein the court re-apportioned fault among the parties. In so doing, the trial court concluded that Appellee was 49% liable and Appellant was 51% liable. (R. 496).

Thereafter, the trial court entered Findings of Fact and Conclusions of Law that: 1- Appellant owed Appellee a duty pursuant to *Utah Code Ann.* § 70A-3-406; 2- Appellant “failed to exercise ordinary care and substantially contributed to ‘an alteration of an instrument or forged signature’” as provided for under *Utah Code Ann.* § 70A-3-406; and 3- “as a result of [Appellant’s] failure to exercise ordinary care under *Utah Code Ann.* § 70A-3-406, [Appellee] was damaged in the amount of \$9,388.44. (R. 502-01).

STATEMENT OF THE FACTS

1. Appellant, L&T Enterprises (referred to herein as “L&T” or “Appellant”) is a Utah corporation with its principal place of business at 215 South Orem Boulevard, Orem, Utah. (R. 8, 64).

2. Appellee, Check City, Inc., (referred to herein as “Check City” or “Appellee”) is a Utah corporation with its principal place of business in Utah County. (R. 8).

3. Check City is not a bank but is in the business of cashing checks for a fee and is recognized as a “check cashing service” as defined by federal law. (R. 200).

4. Alex Trent Mortensen, doing business as TJS Mechanical Inc., (referred to herein as the “Subcontractor” or “TJS”) is an individual who began subcontracting with L&T about November, 1999. (R. 147).

5. TJS had a lengthy customer relationship with Check City and had cashed as many as 60 checks with Check City in an amount totaling approximately \$178,000.00.

(Tr. 107).

6. Beginning about August 20, 2002, L&T began paying TJS for plumbing goods and services by way of issuing checks made jointly payable to TJS and TJS's material suppliers, including Familian Northwest, Inc. (referred to herein as the "Materialman" or "Familian"). (R. 147, Tr. 52).

7. Between December 11, 2003 and February 19, 2004, L&T issued the six Joint Checks made jointly payable to TJS "and" Familian in the sum total amount of \$19,308.12. (R. 147, Tr. 52, 54).

8. TJS endorsed each of the Joint Checks, but failed to deliver the Joint Checks to Familian or otherwise obtain Familian's endorsement. TJS then unilaterally and without authorization from Familian presented the Checks to Check City who honored and cashed the Joint Checks after withholding a percentage fee. (R. 147, Tr. 115).

9. After Check City deposited the Joint Checks into its account with Key Bank, the Joint Checks were then presented to Zion's Bank wherein the check amounts were drawn on L&T's account. (R. 145, Tr. 63-64).

10. In approximately April, 2004, L&T learned that despite the issuance of the Joint Checks, Familian had not received any portion of the Joint Check amounts and was demanding additional payments from L&T so as to satisfy materialman's lien claims. (R. 162).

11. On or about April 30, 2004, L&T prepared and executed an Affidavit of Fraud/Forgery and delivered it to Zion's Bank. (R. 162).

12. On or about May 11, 2004, Zion's Bank returned the Joints Checks to Key

Bank, each accompanied by a notice of dishonor and requiring Key Bank to return the total amount of the Joint Checks previously paid from L&T's account. (R. 146-45, Tr. 65)

13. On or about June 3, 2004, Key Bank returned the total amount of the Joint Checks to Zion's Bank for deposit in L&T's account. (R. 145).

14. On or about June 30, 2004, L&T paid Familian the total sum of \$39,900.34, in order to satisfy and release Familian's materialman's lien claims arising from the subcontracting work provided by TJS and as a replacement of the funds unilaterally received by TJS from Check City. (R. 146, 294, 326, Tr. 77-79).

15. On July 6, 2004, TJS filed for relief under Chapter 7 of the United States Bankruptcy Code, Case No. 04-3083 WTT. (R. 145, Tr. 81).

16. Check City concedes that it was negligent in not reviewing the endorsements on the Checks to insure both endorsements of each of the payees were included. (R. 193-92, Tr. 125).

SUMMARY OF THE ARGUMENT

The trial court erred as a matter of law in determining that Appellant owed Appellee a duty of care pursuant to *Utah Code Ann.* § 70A-3-406. The Joint Checks in this case did not involve a forged signature or an alteration. In the absence of an “*alteration on an instrument*” or a “*forged signature on an instrument*,” section 70A-3-406 simply does not apply and cannot be the basis for a duty or give rise to a cause of action under the undisputed facts of this case. Because this case does not involve a “forged signature” or an “alteration,” but rather involves a missing endorsement, *Utah*

Code Ann. § 70A-3-406, is not applicable. Section 3-406 of the *Uniform Commercial Code* (as adopted in § 70A-3-406), does not create a duty on Appellant as the maker of the Joint Checks to insure proper endorsements. Further, nothing in the language of *Utah Code Ann.* § 70A-3-406 creates an affirmative cause of action. Courts considering such issue have consistently determined that no such cause of action exists under the language of section 3-406 of the Uniform Commercial Code.

The trial court's creation of a legal duty owed by the maker of a joint check (L&T) to a person or entity that takes the check for value notwithstanding missing endorsements (Check City), effectively nullifies the "joint check rule" previously recognized by the Utah Court of Appeals in *Sfr, Inc. v. Control, Inc.*, 2008 UT App 31, 177 P.3d 629 (Utah Ct. App., 2008). Under such legal duty, an owner/general contractor is not "protected through issuance of a joint check" made payable to both the subcontractor and materialman, because if either of the payees is successful, as in this case, in unilaterally obtaining payment on the joint checks, the owner/general contractor may be subjected to negligence claims by the person or entity who was in the best position to insure compliance with the joint check rule. The fundamental importance and recognition of the joint check rule necessitates a determination that L&T as the maker of the Joint Checks owed no duty to Check City.

Even assuming *Utah Code Ann.* § 70A-3-406 could be construed to apply to a case of a missing endorsement and thereby create a duty as well as an affirmative cause of action, Appellee's own negligence in cashing the checks without the required endorsements, supersedes any negligence on the part of the Appellant and is an

independent intervening cause such that it is the legal or proximate cause of the Appellee's injury.

Finally, the trial court erred as a matter of law in dismissing Appellant's Counterclaim. In accepting the Joint Checks, Appellee had a "duty to comply with the direction of the maker to pay [the Joint Checks only upon] the order of the named payees." *Pacific Metals Co., v. Tracy-Collins Bank & Trust Co.*, 446 P.2d 303, 305 (Utah 1968). *See also Utah Code Ann.* § 70A-3-110(4). Appellant had filed a verified counterclaim and thereafter a verified memorandum in opposition to Appellee's motion for summary judgment seeking dismissal of Appellant's counterclaim. A "verified" document is one substantiated by "oath or affidavit." Each verified pleading is the functional equivalent of an "affidavit." Therefore, the trial court's conclusion that there was no "record evidence" that Appellant was damaged by Appellee is incorrect. The trial court's ruling failed to evaluate the evidence in a light most favorable to the party opposing the motion.

ARGUMENT

I. THE TRIAL COURT WAS INCORRECT IN CONCLUDING THAT APPELLANT OWED APPELLEE A DUTY OF CARE UNDER *UTAH CODE ANN.* § 70A-3-406, WITH RESPECT TO THE JOINT CHECKS.

In a case, as in this one, involving a joint payee's missing endorsement, the Utah Supreme Court has recognized, that "it is the maker's exclusive privilege to designate the payees of his checks; and it is not the prerogative of one who accepts and pays it to question whether the maker had sufficient reason for doing so." *Pacific Metals* at 305. The Court recognized that:

[I]n accepting the check, it is his duty to comply with the direction of the maker to pay to the order of the named payees. It is elementary negotiable instruments law that in order to fulfill that requirement all payees must endorse.

The nature of a check is an order by its maker to his banker or depository that the face amount be paid to the payees he designates, and **it is notice to anyone accepting the check that the signatures of all payees are required.**

Pacific Metals at 305 (emphasis supplied). In emphasizing the duty imposed on one who takes a check without the necessary endorsements, the *Pacific Metals* Court rejected the claim of a depository bank on the theory that the subsequent drawee bank was negligent in its failure to promptly warn the depository bank of the missing endorsement. *Pacific Metals* at 305-06.

The theory rejected by the *Pacific Metals* Court is the same theory asserted by Check City against L&T in the instant case – namely that although Check City failed to insure both payee endorsements as expressly required under *Utah Code Ann.* § 70A-3-110(4)⁴, L&T was somehow negligent in its failure to verify proper endorsements on the cancelled checks and thereafter warn Check City that one of the endorsements was missing.⁵ Notwithstanding the *Pacific Metals* precedent, the trial court in the instant case

⁴ *Utah Code Ann.* § 70A-3-110(4) states in the pertinent part: “If an instrument is payable to two or more persons not alternatively, it is payable to all of them and may be negotiated, discharged, or enforced **only by all of them**” (emphasis supplied).

⁵ The duty imposed on L&T for its apparent “failure to verify proper endorsements on the cancelled checks” is even more troubling given the realities of modern banking processes. L&T could only obtain the actual views of the backside of cancelled checks by making a special request that its bank provide it with front and back copies. (R. 162 ¶12-13). Such a duty is wholly incompatible with the realities of reasonable business practices.

concluded that Check City, having accepted and paid on the Joint Checks with a missing endorsement, could in fact assert a negligence claim under *Utah Code Ann.* § 70A-3-406 against L&T as the maker of the Joint Checks.⁶ The trial court then concluded that based on a duty imposed by section 3-406, L&T was substantially negligent (51%) in failing to verify that the Joint Checks had missing endorsements and thereafter warn Check City or otherwise cease issuing joint checks to the Subcontractor.⁷

Utah Code Ann. § 70A-3-406 provides:

Negligence contributing to forged signature or alteration of instrument.

(1) A person whose failure to exercise ordinary care substantially contributes to an alteration of an instrument or to the making of a forged signature on an instrument is precluded from asserting the alteration or the forgery against a person who, in good faith, pays the instrument or takes it for value or for collection.

(2) Under Subsection (1), if the person asserting the preclusion fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss, the loss is allocated between the person precluded and the person asserting the preclusion according to the extent to which the failure of each to exercise ordinary care contributed to the loss.

(3) Under Subsection (1), the burden of proving failure to exercise ordinary care is on the person asserting the preclusion. Under Subsection (2), the burden of proving failure to exercise ordinary care is on the person precluded.

In applying *Utah Code Ann.* § 70A-3-406 to the instant case, the trial court

⁶ Although Check City's Complaint and Trial Brief asserted claims based on negligence, "statutory right to payment"; unjust enrichment; and "monies due and owing," the evidence presented at trial failed to establish the necessary elements related to the "statutory right to payment," unjust enrichment and "monies due and owing" claims. (Tr. 142-143).

⁷ The trial court determined that L&T "had notice of a risk of nonpayment to Familian, by which they [sic] could have escrowed the money, or taken other remedial steps." (Tr. 144).

concluded that:

- 1- L&T as the maker of the Joint Checks “failed to exercise ordinary care”;
- 2- That such failure “substantially contribute[d] to an alteration of an instrument or to the making of a forged signature on an instrument”; and
- 3- Notwithstanding Check City’s failure to insure the required endorsements, Check City did “in good faith,” pay on the Joint Checks or took them “for value.”

(R. 502-01). *See also Utah Code Ann. § 70A-3-406(1).*

The trial court’s principal error was the determination that this case involving a missing endorsement constitutes an “alteration” or a “forged signature.” The term “alteration” is expressly defined in *Utah Code Ann. § 70A-3-407(1)* as follows:

(1) "Alteration" means an unauthorized change in an instrument that purports to modify in any respect the obligation of a party, or an unauthorized addition of words or numbers or other change to an incomplete instrument relating to the obligation of a party.

It is without question that none of the Joint Checks involved any “Alteration” as defined by section 3-407. Further, although the term “forged signature” is not expressly defined by the Commercial Code, it is important to recognize that section 3-406 refers to “forged signature” rather than the term “unauthorized signature” that appeared in former section 3-406. The term “unauthorized signature” is “a broader concept that includes not only forgery, but also the signature of an agent which does not bind the principal under the law of agency.” *Official Comment 2, Uniform Commercial Code 3-406*. Had the legislature intended to include the concept of a missing endorsement within the concept

of a “forged signature,” it could have done so in the context of defining an “Indorsement” under the Commercial Code.⁸ In the instant case, it is clear that none of the Joint Checks involved a “forged signature” of any kind. Rather, it was the complete lack of a required “Indorsement,” from the Materialman payee, that resulted in the claimed damages.⁹

To impose a duty on the Appellant under *Utah Code Ann.* § 70A-3-406, is not only contrary to the plain language of section 3-406, it is also contrary to the Utah Supreme Court’s decision in *Pacific Metals* and other case law outside Utah. *See e.g., Chow v. Enterprise Bank & Trust Company*, 16 Mass. L. Rptr. No. 31, 795, 797 (Mass. 2003) (concluding that “it is clear that section 3-406 in its current form does not cover a missing indorsement” and in so doing, dismissed the claimant’s negligence claim); *John Hancock Financial Services, Inc., v. Old Kent Bank*, 346 F.3d 727, 731 (6th Cir., 2003) (concluding that the concept of a “forged signature” under *Uniform Commercial Code* 3-406 was intended by the drafters to be narrowly construed and that an improper

⁸ **70A-3-204. Indorsement.**

(1) "Indorsement" means a signature, other than that of a signer as maker, drawer, or acceptor, that alone or accompanied by other words is made on an instrument for the purpose of negotiating the instrument, restricting payment of the instrument, or incurring indorser's liability on the instrument, but regardless of the intent of the signer, a signature and its accompanying words is an indorsement unless the accompanying words, terms of the instrument, place of the signature, or other circumstances unambiguously indicate that the signature was made for a purpose other than indorsement. For the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument.

⁹ The Official Comment to 4-406 of the Uniform Commercial Code also reflects that the use of the terms “alteration” and “unauthorized signature” as those terms are used in section 4-406, does not apply to a case of a missing or unauthorized endorsement. . . . “Section 4-406 imposes no duties on the drawer (L&T) to look for unauthorized indorsements.” *Official Comment 5, Uniform Commercial Code 4-406.*

endorsement did not constitute a “forged signature” under the *Uniform Commercial Code* 3-406).

In addition to the recognition that section 3-406 does not apply to cases involving missing endorsements, Courts have also declined to apply the provisions of *Uniform Commercial Code* 3-406, to create an affirmative cause of action. See e.g. *Select Express v. American Trade*, 943 A.2d 90, 95 (Md. App. 2008) (concluding that under 3-406, “there is no duty” between the drawer and the party who takes the check; affirming the dismissal of a check cashing service’s claims for negligence and breach of contract asserted under UCC 3-406);¹⁰ *City Check v. Jul-AME Construction Company*, 742 A.2d 141 (N.J. Super. A.D. 1999) (determining that none of the cases cited by the plaintiff and based on UCC 3-406 provide an affirmative cause of action for negligence). In concluding that the *Uniform Commercial Code* 3-406 does not give rise to an affirmative cause of action, both the *Select Express* Court and the *City Check* Court also cited to the *Official Comment 1* of the *Uniform Commercial Code* 3-406 which states in the pertinent part: “Section 3-406 does not make the negligent party liable in tort for damages resulting from the alteration.” *Official Comment 1, Uniform Commercial Code* 3-406.

In addition to the recognition that 3-406 does not allow for an affirmative cause of

¹⁰ The plaintiff in the *Select Express* case asserted a similar negligence claim against the defendant as Check City asserted against L&T in this case: namely that the defendant (L&T) should have reviewed the back of the returned checks and could have then notified plaintiff (Check City) of the problems with the cancelled checks. The Court determined that plaintiff’s reliance on the defendant to verify the endorsements on the back of the cancelled checks was unreasonable and accordingly “there was no duty” owed to plaintiff. *Select Express* at 95.

action, important policy reasons related to the recognition of the “joint check rule,” should preclude Check City from asserting a negligence claim against L&T. In recognizing the important and “widespread practice in the construction industry” of the joint check rule, the *Sfr, Inc.*, Court stated:

The joint check rule . . . allows owners and general contractors to protect themselves from lien foreclosure by materialmen whom subcontractors have failed to pay. . . . The practice of issuing joint checks protects both the owner/general contractor and the materialman, because each has an interest in ensuring that the materialman is paid.

Sfr, Inc., at ¶ 23.

If, as in this case, an owner/general contractor (L&T) is subjected to litigation from a third party (Check City) who has failed to honor the direction of the maker by ensuring the endorsement of the named payees, the joint check rule ceases to provide the protection contemplated by the *Sfr, Inc.*, Court. The trial court’s imposition of a duty upon L&T as the maker of the Joint Checks, was based on the conclusion that L&T “could have escrowed the money, or taken other remedial steps.” (Tr. 144). Any such duty effectively defeats the entire purpose of the joint check rule. An owner/general contractor would no longer be protected from claims asserting the owner/general contractor’s negligence for failing to pay materialmen and subcontractors directly -- forcing the owner/general contractor to interpose itself into the relationship between the subcontractor and materialmen.

Under such legal duty, an owner/general contractor is not protected through issuance of a joint check made payable to both the subcontractor and materialman. If either of the co-payees is successful, as in this case, in unilaterally obtaining payment on

the joint checks, the owner/general contractor may be subjected to negligence claims by the person or entity who was in the best position to insure compliance with the joint check rule.

In summary, the plain and clear language of *Utah Code Ann.* § 70A-3-406, simply does not apply to the undisputed facts of the instant case. The trial court's conclusion that a duty was owed to Check City under such statutory provision is contrary to the express language of section 3-406 as well as recognized case law. Further, the trial court's imposition of such a claim against L&T effectively nullifies the joint check rule designed to protect the maker and the payees of a joint check.

II. THE TRIAL COURT WAS INCORRECT IN CONCLUDING THAT APPELLANT'S COMPARITIVE NEGLIGENCE WAS GREATER THAN THAT OF THE APPELLEE AND THAT SUCH NEGLIGENCE WAS THE PROXIMATE CAUSE OF APPELLEE'S CLAIMED DAMAGES.

Even assuming that *Utah Code Ann.* § 70A-3-406 allows for the creation of an affirmative cause of action for negligence in a case where Check City paid on the Joint Checks without the required endorsements, Check City should bear the loss. Check City's admitted failure to comply with *Utah Code Ann.* § 70A-3-110(4),¹¹ supersedes any comparative negligence that might be attributed to L&T's issuance of the Joint Checks. Indeed, at a time when Check City believed some portion of the Joint Checks was owed to the Subcontractor, Check City acknowledged that its own negligence should preclude it from "collecting Familian's right in each of the [Joint] Checks" (R. 192). When, however, the evidence at trial demonstrated that the full amount from each of the Joint

¹¹ See Footnote 4. *supra*.

Checks was actually owed to Familian, Check City was forced to change its theory to assert that L&T's negligence superceded its own.

In the *Pacific Metals* case, the Utah Supreme Court relied on the recognized principle that the party in the best position to prevent the harm ought to bear the loss. *Pacific Metals* at 306 (“It is a general principle that one who commits a wrong must take the consequences and cannot complain that someone else doesn’t rescue him therefrom”). See also *Davencourt*, at ¶ 53 (recognizing the “equitable consideration that between two innocent parties, the one in the better position to prevent the harm ought to bear the loss”). As previously discussed, the *Pacific Metals*’ Court relied on this recognized principle in rejecting a claim that a drawee bank should have warned a depository bank of a co-payee’s missing endorsement. *Pacific Metals* at 306.

Other courts across the country have consistently recognized this same principle in rejecting various claims brought by those persons or entities that paid on an instrument without proper endorsement. See e.g., *Sovereign Bank v. United National Bank*, 2003 N.J. 130 (NJSAD. 2003) (recognizing as a matter of law that by accepting a check without the required endorsements of a co-payee, the depository institution “did not act in a commercially reasonable manner”); *Seaman Corporation v. Binghamton Savings Bank*, 643 N.Y.S.2d 767, 770, 220 A.D.2d 62 (N.Y.A.D. 3 Dept. 1996) (recognizing that a depository institution’s failure to insure both endorsements on a joint check, superseded any duty on the maker to inspect a cancelled check for a missing endorsement); *New Jersey Steel Corp. v. Warburton*, 655 A.2d 1382 (N.J. 1995) (recognizing that a maker’s

lack of reasonable care in examining its monthly bank statements did not supersede the depository institutions own failure to exercise reasonable care in reviewing the required endorsements); *The Knight Publishing Co. v. The Chase Manhattan Bank*, 125 N.C. App. 1, 17-19, 79 S.E. 2d. 478 (N.C. App. 1997) (discussing cases that recognize the lack of ordinary care by depository institutions that pay on an instrument with a missing endorsement). *See also*, 2 *White & Summers, Uniform Commercial Code*, § 18-1 (4th ed. 1995) (The Uniform Commercial Code recognizes that “the loss should normally come to rest upon the first solvent party in the stream after the [wrongdoer]”).

Based on Check City’s acknowledged failure to insure both co-payee endorsements on the Joint Checks, Check City was in the best position to protect against loss and cannot as a matter of law establish that it acted in a commercially reasonable manner. The trial court’s determination that Check City’s negligence (49%) was less than that of L&T’s (51%), and, therefore, Check City was entitled to recover 50% of four (4) Joint Checks, is contrary to the recognized equitable principle that having committed the wrong, Check City must take the consequences and cannot complain that L&T did not rescue it.¹²

The trial court implicitly concluded that L&T’s issuance of the Joint Checks was the proximate cause of Appellee’s damages. The trial court stated that L&T “could have

¹² This equitable principle is especially appropriate in this case given Check City’s extensive customer relationship with the Subcontractor (having accepted and paid on as many as 60 checks totaling an amount in excess of \$175,000.00), and given that Check City recognized immediate value from this relationship through the check cashing fee charged on each check received. (Tr. 107).

escrowed the money, or taken other remedial steps,” or in other words, done something other than issue the Joint Checks under the circumstances. (Tr. 144). Fundamentally, the trial court imposed a duty on L&T to take “other remedial steps” to pay both the Subcontractor and the Materialman separately, rather than issue the Joint Checks. Although the imposition of such a duty on L&T effectively eviscerates the joint check rule (*supra*), L&T’s issuance of the Joint Checks cannot be the proximate cause of Check City’s damages. Check City’s own negligence in failing to require both co-payee endorsements is an independent intervening cause to Check City’s injury. *See Pacific Metals* at 306; and *Utah Code Ann.* § 70A-3-110(4) (a joint check “payable to two or more persons not alternatively” is **only** negotiable by all payees). Because of Check City’s failure to fulfill its “duty to comply with the direction of the maker to pay to the order of the named payees” (*Pacific Metals* at 306), such act of negligence was an “independent intervening cause and therefore the sole proximate cause.” *Watters v. Query*, 626 P.2d 455, 458 (Utah 1981) (citation omitted).

Because any negligence by L&T as the maker of the Joint Checks cannot legally be the proximate cause of Check City’s injury, the trial court’s imposition of liability on L&T should be reversed.

III THE TRIAL COURT WAS INCORRECT IN GRANTING APPELLEE’S SUMMARY JUDGMENT MOTION

The sole basis for Check City’s Motion for Summary Judgment on L&T’s negligence cause of action and the trial court’s ultimate ruling granting Check City’s Motion, was that L&T had failed to adequately demonstrate the damage arising from

Check City's failure to require both co-payee endorsements before cashing the Joint Checks. (R. 276, 331). In its ruling, the trial court stated:

In its opposition memorandum, [L&T] states that it "paid at least \$19,308.12 more than it would have had to pay" because of [Check City's] negligence. Opposition, p. 3. However, [L&T] has not supported its assertion with record evidence. Neither has it explained how [Check City's] payment of money to TJS increased [L&T's] payments to Familian, a separate entity."

(R. 331).

In referencing L&T's "Opposition" and acknowledging L&T's claim that it had "paid at least \$19,308.12¹³ more than it would have had to pay" but for Check City's negligence, the trial court appeared to miss the record evidence before it. First, the "Opposition" referenced by the trial court was a "Verified" pleading. (R. 296 - Verified Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment (hereafter "Verified Memorandum"). Second, L&T's Verified Counterclaim and Verified Memorandum set forth how L&T had been damaged. The Verified Counterclaim provides record evidence that after Check City failed to require both co-payee endorsements, L&T was required to pay Familian the sum of \$39,900.34. (R. 73). L&T's Verified Memorandum further provides that this amount was \$20,592.22 more than L&T would have otherwise had to pay Familian, but for Check City's negligence. (R. 298). Because Check City had improperly paid TJS on the Joint Checks, L&T

¹³ The trial court apparently confused the claimed damage amount (\$20,592.22) with the total amount of the Joint Checks (\$19,308.12). (R. 294, 331).

asserted by way of “Verified” pleadings¹⁴ that it ultimately was required to pay Familian \$20,592.22 more than it otherwise would have paid Familian, if Check City had required both co-payee endorsements. Simply put, as a result of the fact that Familian was never paid from the Joint Checks at the time the Joint Checks were originally issued, L&T was later required to pay Familian not only the original amount of the Joint Checks, but additional sums in order to obtain the necessary lien releases. Such additional payments were a direct result of Check City’s negligence.

As previously set forth, “[a] district court is precluded from granting summary judgment if the facts shown by the evidence on a summary judgment motion support more than one plausible but conflicting inference on a pivotal issue in the case....” *Uintah Basin Medical Center v. Hardy*, 179 P.3d 786, 790 (Utah 2008). Further, “summary judgment is appropriate in negligence cases only in the clearest instances.” *Trujillo*, at ¶12, (quoting *Nelson v. Salt Lake City*, 919 P.2d 568, 571 (Utah 1996)). In the instant case, the verified pleadings before the trial court supported a “plausible inference” in favor of L&T regarding the alleged damages arising from Check City’s negligence.

The trial court’s granting of summary judgment resulting in the dismissal of L&T’s damage claim against Check City was based on a perceived lack of “record evidence.” In so doing, the trial court did not properly consider the verified pleadings before it and failed to evaluate such evidence in a light most favorable to the party

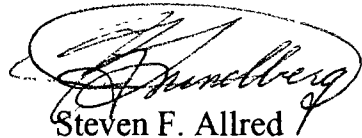
¹⁴ To “verify” something means to “confirm or substantiate by oath or affidavit.” *BLACK’S LAW DICTIONARY* 1558 (7TH ed. 1999).

opposing summary judgment.

CONCLUSION

Based on the foregoing, Appellant respectfully submits that this Court should reverse the trial court's judgment against Appellant, and further, reinstate Appellant's claim for damages.

DATED this 2nd day of January, 2010.

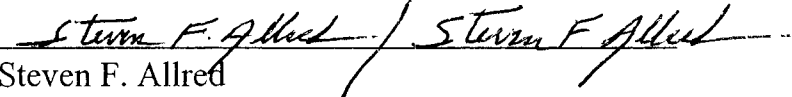
A handwritten signature in black ink, appearing to read "S. Allred", enclosed within an oval-shaped stamp or seal.

Steven F. Allred
Jim F. Lundberg
Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that on this 12th day of January, 2010 I caused a true and correct copy of
BRIEF OF APPELLANT to be mailed in the United States mail, first class postage
prepaid thereon to the following:

Tyler Young, Esq.
YOUNG KESTER & PETRO
75 South 300 West
Provo, Utah 84604


Steven F. Allred

ADDENDUM

70A-3-110. Identification of person to whom instrument is payable.

(1) The person to whom an instrument is initially payable is determined by the intent of the person, whether or not authorized, signing as, or in the name or behalf of, the issuer of the instrument. The instrument is payable to the person intended by the signer even if that person is identified in the instrument by a name or other identification that is not that of the intended person. If more than one person signs in the name or behalf of the issuer of an instrument and all the signers do not intend the same person as payee, the instrument is payable to any person intended by one or more of the signers.

(2) If the signature of the issuer of an instrument is made by automated means, such as a check-writing machine, the payee of the instrument is determined by the intent of the person who supplied the name or identification of the payee, whether or not authorized to do so.

(3) A person to whom an instrument is payable may be identified in any way, including by name, identifying number, office, or account number. For the purpose of determining the holder of an instrument, the following rules apply:

(a) If an instrument is payable to an account and the account is identified only by number, the instrument is payable to the person to whom the account is payable. If an instrument is payable to an account identified by number and by the name of a person, the instrument is payable to the named person, whether or not that person is the owner of the account identified by number.

(b) If an instrument is payable to:

(i) a trust, an estate, or a person described as trustee or representative of a trust or estate, the instrument is payable to the trustee, the representative, or a successor of either, whether or not the beneficiary or estate is also named;

(ii) a person described as agent or similar representative of a named or identified person, the instrument is payable to the represented person, the representative, or a successor of the representative;

(iii) a fund or organization that is not a legal entity, the instrument is payable to a representative of the members of the fund or organization; or

(iv) an office or to a person described as holding an office, the instrument is payable to the named person, the incumbent of the office, or a successor to the incumbent.

(4) If an instrument is payable to two or more persons alternatively, it is payable to any of them and may be negotiated, discharged, or enforced by any or all of them in possession of the instrument. If an instrument is payable to two or more persons not alternatively, it is payable to all of them and may be negotiated, discharged, or enforced only by all of them. If an instrument payable to two or more persons is ambiguous as to whether it is payable to the persons alternatively, the instrument is payable to the persons alternatively.

70A-3-204. Indorsement.

(1) "Indorsement" means a signature, other than that of a signer as maker, drawer, or acceptor, that alone or accompanied by other words is made on an instrument for the purpose of negotiating the instrument, restricting payment of the instrument, or incurring indorser's liability on the instrument, but regardless of the intent of the signer, a signature and its accompanying words is an indorsement unless the accompanying words, terms of the instrument, place of the signature, or other circumstances unambiguously indicate that the signature was made for a purpose other than indorsement. For the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument.

(2) "Indorser" means a person who makes an indorsement.

(3) For the purpose of determining whether the transferee of an instrument is a holder, an indorsement that transfers a security interest in the instrument is effective as an unqualified indorsement of the instrument.

(4) If an instrument is payable to a holder under a name that is not the name of the holder, indorsement may be made by the holder in the name stated in the instrument or in the holder's name or both, but signature in both names may be required by a person paying or taking the instrument for value or collection.

70A-3-406. Negligence contributing to forged signature or alteration of instrument.

(1) A person whose failure to exercise ordinary care substantially contributes to an alteration of an instrument or to the making of a forged signature on an instrument is precluded from asserting the alteration or the forgery against a person who, in good faith, pays the instrument or takes it for value or for collection.

(2) Under Subsection (1), if the person asserting the preclusion fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss, the loss is allocated between the person precluded and the person asserting the preclusion according to the extent to which the failure of each to exercise ordinary care contributed to the loss.

(3) Under Subsection (1), the burden of proving failure to exercise ordinary care is on the person asserting the preclusion. Under Subsection (2), the burden of proving failure to exercise ordinary care is on the person precluded.

70A-3-407. Alteration.

(1) "Alteration" means an unauthorized change in an instrument that purports to modify in any respect the obligation of a party, or an unauthorized addition of words or numbers or other change to an incomplete instrument relating to the obligation of a party.

(2) Except as provided in Subsection (3), an alteration fraudulently made discharges a party whose obligation is affected by the alteration unless that party assents or is precluded from asserting the alteration. No other alteration discharges a party, and the instrument may be enforced according to its original terms.

(3) A payor bank or drawee paying a fraudulently altered instrument or a person taking it for value, in good faith and without notice of the alteration, may enforce rights with respect to the instrument according to its original terms, or in the case of an incomplete instrument altered by unauthorized completion, according to its terms as completed.

FILED
Fourth Judicial District Court
of Utah County, State of Utah
7/7/09 MT Deputy

Tyler S. Young (11325)
YOUNG, KESTER & PETRO
75 South 300 West
Provo, UT 84601
Telephone: (801) 379-0700
Facsimile: (801) 379-0701

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

CHECK CITY, INC.,
Plaintiff,

v.

L&T ENTERPRISES,
Defendants.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND
JUDGMENT

Civil No. 060403068
Judge Fred D. Howard

On Wednesday, May 27, 2009, the Court conducted a one day trial. Steven F. Allred and Jim F. Lundberg appeared on behalf of Defendant L & T Enterprises. (Hereinafter "L & T".) Tyler Young of the firm of Young, Kester & Petro appeared on behalf of Plaintiff, Check City, Inc. (Hereinafter "Check City".) Prior to the trial, L & T filed a Motion in Limine (hereinafter "Motion") which Motion was argued by the parties. At the conclusion of oral argument on the Motion, Check City presented its case and rested. The parties stipulated to the facts in Exhibit One (1). The Court then made the following findings of fact and conclusions of law and judgments.

1. L & T owed Check City a duty pursuant to Utah Code Annotated Section

(hereinafter "UCA") 70A-3-406.

2. L & T failed to exercise ordinary care and substantially contributed to "an alteration of an instrument or forged signature" on Check No.'s 51459, 51747, 51765 and 51766.

3. As a result of L & T's failure to exercise ordinary care under UCA §70A-3-406, Check City was damaged in the amount of \$9,388.44. (50% of Check No.'s 51459, 51747, 51765, 51766).

4. L & T was 51% liable and Check City was 49% liable for the negligence asserted.

According to the above findings of fact and conclusions of law, it is hereby

ORDERED

1. Judgment for the Plaintiff in the amount of one half of the total amount of check numbers 051747, 051459, 051766, and 051765, written by the Defendant L&T Construction. The total sum of these checks is \$18,776.88, making the amount due to Check City, Inc., from L&T Enterprises equal to \$9,388.44.

2. That the Defendant pay prejudgment interest on the amount due to the Plaintiff equal to 10% per annum, with the interest calculation beginning from April 1, 2004, and running to the time of judgment being entered by the court. U.C.A. 1953, 15-1-1. Said amount of interest equal:

2004: \$704.13 (April 1 through December 31)

2005: \$938.84 (January 1 through December 31)

2006: \$938.84 (January 1 through December 31)

2007: \$938.84 (January 1 through December 31)

2008: \$938.84 (January 1 through December 31)

2009: \$391.19 (January 1 through May 31)

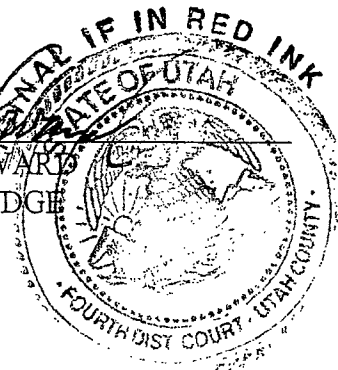
Total: \$4,850.68

3. That the Defendant pay costs and court fees as outlined by the Plaintiff in his Memorandum of Costs, pursuant to Utah Rules of Civil Procedure 54(d), and totaling \$437.25.

4. Total Judgment in the amount of \$14,676.37

BY THE COURT:


JUDGE FRED D. HOWARD
DISTRICT COURT JUDGE



Approved as to form:


Steven F. Allred

FILED
Fourth Judicial District Court
of Utah County, State of Utah
5/3/09 MT Deputy

**IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR
UTAH COUNTY, STATE OF UTAH**

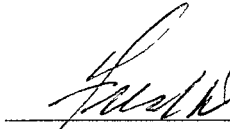
CHECK CITY, Plaintiff, v. L & T ENTERPRISES, Defendant.	RULING RE: Amended Ruling Case No. 060403068 Judge Fred D. Howard
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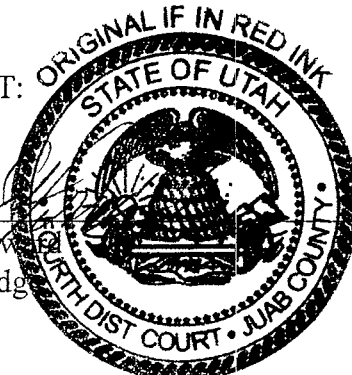
RULING

Both parties were present at a bench trial where the Court took evidence and listened to oral arguments presented on May 27, 2009. After hearing all the evidence and argument, the Court made an oral Ruling in favor of Check City. Upon further reflection, the Court will amend its Ruling with respect to liability only. The Court finds Check City was 49% liable and L & T Enterprises was 51% liable for the negligence asserted. Counsel for Check City is directed to prepare an order consistent with this Ruling.

DATED this 2nd day of June, 2009.

BY THE COURT:


Hon. Fred D. Howard
District Court Judge



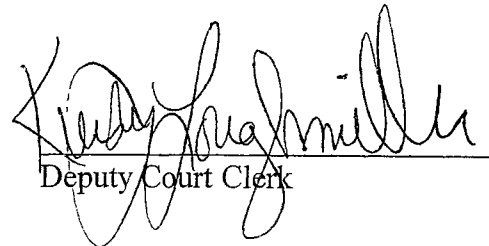
CERTIFICATE OF DELIVERY

2 I certify that true copies of the foregoing Ruling were mailed, postage prepaid, on the day of June, 2009 to the following at the addresses indicated:

Tyler Allen
75 S 300 W
Provo, Utah 84601

Steven Allred
584 South State Street
Orem, Utah 84058

Jim Lundberg
1524 E 715 S
Mapleton, Utah 84664


Deputy Court Clerk

FILED

APR 24 2008

4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

HW

**IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR
UTAH COUNTY, STATE OF UTAH**

CHECK CITY, INC., Plaintiff, v. L & T ENTERPRISES, Defendants.	RULING RE: PLAINTIFF'S SECOND MOTION FOR SUMMARY JUDGMENT Case No. 060403068 Judge Fred D. Howard
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This matter comes before the Court on Plaintiff's Second Motion for Summary Judgment. Plaintiff filed the motion and a supporting memorandum on December 12, 2007. On December 31, 2007, Defendant filed a memorandum in opposition.¹ Plaintiff filed a reply memorandum on January 10, 2008 and submitted the matter for decision on February 25, 2008. Plaintiff requested oral argument.

Having considered the parties' briefs and the applicable law, the Court has determined that oral argument is unnecessary and now makes the following Ruling:

RULING

Plaintiff moves the Court to dismiss Defendant's counterclaim for negligence, asserting that it owed no duty to Defendant, and that even if it did owe a duty, it is undisputed that Defendant was not

¹Defendant's December 31, 2007 filing did not include the exhibits referred to in the memorandum. Defendant filed the memorandum again on January 18, 2008 with the exhibits included.

damaged by Plaintiff's actions. Defendant argues that Plaintiff's statement of undisputed facts is not supported by record evidence. Defendant also asserts that Plaintiff breached a duty and that Defendant has, therefore, been damaged in the amount of at least \$19,308.12.

"Summary judgment is proper when there is no genuine issue of material fact" and the moving party is entitled to judgment as a matter of law. Pugh v. Dozzo-Hughes, 2005 UT App. 203 ¶23, 112 P.3d 1247. In ruling on a motion for summary judgment, the Court "'view[s] the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party.'" Id. (quoting Carrier v. Salt Lake County, 2004 UT 98 ¶3, 104 P.3d 1208).

"[O]nce the moving party challenges an element of the nonmoving party's case on the basis that no genuine issue of material fact exists, the burden then shifts to the nonmoving party to present evidence that is sufficient to establish a genuine issue of material fact." Orvis v. Johnson, 2006 UT App 394, ¶ 16, 146 P.3d 886 (citations omitted). The nonmoving party must present more than "conclusory or speculative assertions." Id. at ¶ 11.

Defendant disputes paragraphs 8-15 of Plaintiff's statement of undisputed facts. Defendant first disputes facts 8-9 as having no record citation. However, the Court agrees with Plaintiff's assertion that facts 8-9 are a condensed version of the allegations made in Defendant's Counterclaim. See Defendant's Answer and Verified Counterclaim at p. 8, ¶¶ 13-20. Therefore, the Court finds that facts 8-9 are undisputed by the parties. Second, Defendant disputes facts 13-15 as being unsupported by record evidence. However, paragraphs 13-15 are merely concessions by Plaintiff for the purposes of arguing this motion.

Finally, Defendant disputes facts 10-11, arguing that they rely on a deficient March 27, 2007

affidavit of Van Willis ("Affidavit"). The Court notes that the first line of the Affidavit refers to Tyler S. Young as the affiant. However, the heading, the signature, and the notary's statement all indicate that Van Willis was the affiant. The Court finds that the inclusion of the name "Tyler S. Young" was a mistake, but that it does not materially affect the validity or content of the Affidavit. Therefore, the Court denies Defendant's request to strike the Affidavit and finds that paragraphs 10-11 are supported by a valid citation to the record.

Defendant has provided no citations to record evidence to further dispute any of Plaintiff's list of undisputed facts. Based on the briefs, the Court finds that Plaintiff's facts are undisputed. Defendant provided an additional fact, that Defendant "paid TJS for its 'labor' through separate and distinct checks . . ." Opposition, p. 2. Defendant supports this assertion by attaching copies of six checks which total \$28,756.16. However, Defendant does not indicate how those checks are related to this claim and has not argued that they demonstrate any double payment to either TJS or Familian. Without such explanation, the Court cannot conclude that they are related to the matter at hand or that they are evidence of damage related to Plaintiff's alleged negligence.

To prevail on a claim for negligence, a party must show, "1) that the defendant owed the plaintiff a duty, 2) that the defendant breached that duty, 3) that the breach of duty was the proximate cause of the plaintiff's injury, and 4) that the plaintiff in fact suffered injuries or damages." Webb v. University of Utah, 2005 UT 80, ¶9, 125 P.3d 906 (citations omitted). For the purposes of argument on this motion, Plaintiff has conceded the elements of duty and breach.

Based on the undisputed evidence, Plaintiff cashed six checks written by Defendant to TJS and Familian jointly. Plaintiff paid \$19,308.12 directly to TJS based on those checks. Defendant's bank

ultimately did not honor the checks or transfer Defendant's money to Plaintiff, so Defendant never paid money on those checks. While Plaintiff has a pending claim against Defendant for the amount Plaintiff paid to TJS, Defendant has not been damaged at this point in time by Plaintiff's pending claim.

Defendant's arguments amount to a defense that it is not obligated to pay Plaintiff because any loss is a result of Plaintiff's own negligence. However, the crux of the argument on this motion is not whether Defendant has a viable defense of comparative negligence, but a separate counterclaim of negligence when Defendant can point to no damages.

Defendant's Counterclaim states that Defendant was damaged by Plaintiff "in the amount of at least \$39,900.34." Counterclaim, p. 9, ¶ 29. In its opposition memorandum, Defendant states that it "paid at least \$19,308.12 more than it would have had to pay" because of Plaintiff's negligence. Opposition, p. 3. However, Defendant has not supported its assertion with record evidence. Neither has it explained how Plaintiff's payment of money to TJS increased Defendant's payments to Familian, a separate entity.

While Defendant characterizes Plaintiff's argument as flawed, it is axiomatic that a negligence cause of action must include an injury. This record reflects none. Therefore, the Court grants Plaintiff's motion for summary judgment.

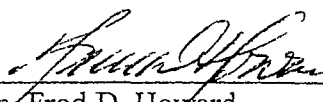
The Court also notes that Defendant's memorandum in opposition refers to Plaintiff's arguments as "nonsensical" and "cratered with additional absurdities," and states that "Plaintiff's logic, or lack thereof, is flawed to say the least!" Opposition, p. 2. Those comments are not legal arguments and serve no purpose in responding to the arguments presented by Plaintiff. The Court advises Defendant that the above comments violate standard number three of the Utah Standard of Professionalism and

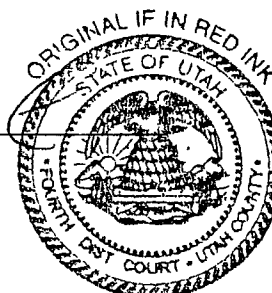
Civility as a “written submission . . . disparag[ing] the . . . intelligence . . . of an adversary.” The Court admonishes counsel to avoid such comments in future submissions.

The Court grants Plaintiff’s second motion for summary judgment regarding Defendant’s negligence counterclaim. The Court notes that this Ruling does not affect Defendant’s affirmative defense of comparative negligence. Counsel for Plaintiff is directed to prepare an order consistent with this Ruling.

DATED this 24 day of April, 2008.

BY THE COURT:


Hon. Fred D. Howard
District Court Judge



Steven F. Allred 5437
Law Office of Steven F. Allred, P.C.
Attorney for the Defendant and CounterClaimant
584 S. State Street
Orem, Utah 84058
(801) 431-0718

FILE COPY

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

)	VERIFIED
)	MEMORANDUM OF POINTS AND
CHECK CITY, INC.,)	AUTHORITIES IN OPPOSITION TO
)	PLAINTIFF'S MOTION FOR
Plaintiff,)	SUMMARY JUDGMENT
)	
v.)	Civil No. 060403068
)	
L & T ENTERPRISES,)	JUDGE: Fred D. Howard
)	
Defendant)	
)	
L & T ENTERPRISES,)	
)	
Counter Claimant,)	
)	
v.)	
)	
CHECK CITY, INC.,)	
)	
Counterclaim Defendant.)	
)	

Defendant, L & T Construction, by and through its attorney, Steven F. Allred, pursuant to Rule 56 of the Utah Rules of Civil Procedure hereby responds to Plaintiff's Motion for Summary Judgment (hereinafter "Motion") as follows. In support thereof, L & T represents to the Court as

follows.

STATEMENT OF UNDISPUTED FACTS

Defendant does not dispute Paragraphs 1-7. However, Defendant does dispute paragraphs 8-15 for the following reasons. First, paragraphs 8-9 and 13-15 are disputed for the reason that Plaintiff fails to properly cite to the record. Second, paragraphs 10-11 cite to the Affidavit of Van Willis (hereinafter "Affidavit"). The Affidavit is deficient for the following reasons. The name of the affiant in the Affidavit is "Tyler S. Young." However, the signator of the Affidavit is "Van Willis."

ADDITIONAL FACTS DEEMED RELEVANT AND MATERIAL

1. L & T paid TJS only for its "labor" through separate and distinct checks, copies of which are attached hereto as Exhibit "A"

ARGUMENT

I PLAINTIF'S ARGUMENT THAT IT CAUSED NO INJURY TO DEFENDANT IS NONSENSICAL

Plaintiff argues that it "caused no harm to L & T." (Memorandum, p. 4 ¶ 3).

Furthermore, Plaintiff reasons that since L & T had to pay Familian for materials anyway "...it does not matter whether L & T paid Familian through the Checks that were cashed by Plaintiff or directly. Either way, L & T had to pay Familian a certain sum of money—\$39,900.34."

(Memorandum, p. 4, ¶ 4). Plaintiff's argument is crated with additional absurdities which do not bear repeating. Plaintiff's logic, or lack thereof, is flawed to say the least! Furthermore, Plaintiff's arguments are also irrelevant.

L & T issued six joint checks (hereinafter "Checks") payable to TJS and Familian—TJS's

L & T issued six joint checks (hereinafter “Checks”) payable to TJS and Familian–TJS’s plumbing supplier. Contrary to Plaintiff’s unsupported assertions, TJS was not entitled to any of the funds in the Checks. Attached hereto as Exhibit “A” is the deposition transcript of Trent Mortensen, (hereinafter “Mortensen”) TJS’s principal. Mortensen testified that he was not entitled to any of the proceeds payable from the Checks. In fact, Mortensen further testified in his years as a plumbing subcontractor that he has never received any proceeds from a supplier from a joint check to whom he had delivered the check. (Exhibit “B” p. lines). In other words, a joint check delivered by a subcontractor to a supplier rarely if ever results in the supplier remitting funds from the checks back to the subcontractor.

Plaintiff completely misses the mark in asserting that L & T has not been damaged by Check City’s actions. Furthermore, whether Check City benefitted from L & T or its bank is irrelevant. Plaintiff’s argument seems to be that since Check City did not benefit from L & T’s checks, it could not have harmed L & T by its checking cashing actions. What Plaintiff’s argument ignores is that L& T as a result of Check City’s negligent behavior (i.e., cashing checks which on their face were missing one required signature) paid at least \$19, 308.12 more than it would have had to pay if Familian had in fact received the cumulative total of the Checks, i.e., \$39,900.34¹.

Contrary to Plaintiff’s elementary and absurd argument, L & T concedes that it would have to pay Familian for whatever materials L & T’s subcontractor obtained from the supplier provided that such were incorporated into L & T projects. What Plaintiff’s arguments ignore is

¹ The difference between \$39, 900.34 less 19, 308.12 of \$20, 592.22 is attributable to additional amounts paid by L&T to other subcontractors to finish TJS’s work, i.e., to mitigate L & T’s damages caused when Mortensen refused to complete his contracts.

that L& T earmarked the funds in the joint checks for such purpose. Because of Check City's actions in permitting TJS to cash the Checks in contravention of L & T's express instructions, Check City compromised L& T's joint check instruction safeguards and permitted those funds to be diverted and ultimately, embezzled by TJS. Accordingly, not only did Check City thwart L & T joint instructions, but L& T was forced pay Familian twice for the supplies it sold to TJS.

II WHETHER OR NOT CHECK CITY BREACHED ITS DUTY IS A ORDINARILY A QUESTION OF FACT.

Check City further argues that it owed no duty to L & T because "Check City only stood to injure itself by cashing the Checks..." (Memorandum, p. 5, ¶ 4). Check City's memorandum and arguments are completely devoid of any meaningful analysis or discussion on the existence or non-existence of a duty for a negligence claim. In short, Check City's memorandum treats the Court as if it is "a depository in which [it] the appealing party may dump the burden of argument and research." *State v. Thomas*, 961 P.2d 299, 305 (Utah 1998). "Ordinarily, the question of negligence is a question of fact for the jury. *Hunt v. Hurst*, 785 P.2d 414, 415 (Utah 1990) . Thus, summary judgment is appropriate in negligence cases only in the clearest instances. *Id.* at 415 as cited in *Dwiggins v. Morgan Jewelers*, 811 P.2d 182 (Utah 1991). In this case, Check City seeks summary judgment on L & T's counterclaim for negligence. The only way that Check City might prevail on its summary judgment motion is to demonstrate the non-existence of a duty running between the parties, which it has not even addressed, let alone carried the burden of persuasion.²

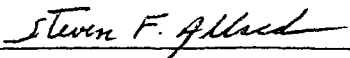
² The only case which is remotely relevant is *Ramsey v. Hancock*, 79 P.3d 423 (Ut. App Ct. 2003) which deals with a similar situation but in the context of whether a depository bank owes a duty to a non-customer payee. Check City concedes that it is not a bank or check cashing institution and further concedes that it does not have a debtor-creditor relationship with

The issue of whether a duty exists is entirely a question of law to be determined by the court. *Smith v. Frandsen*, 94 P.3d 919, 921 (Utah 2004). Courts consider many factors, none of which is dispositive, in determining when a duty runs between parties...The duty concept...is a policy determination...which leads the law to say that the particular plaintiff is entitled to protection. *Id.* at 921. "Negligence is the breach of a duty to use due care under the circumstances fo the situation." *Nelson v. Salt Lake City*, 919 P.2d 568, 573 (Utah 1996). Check City has failed to adequately raise or brief the Court in its memorandum relative to the absence of a duty. Check City simply posits that no duty exists and therefore, requests that L & T 's counterclaim be dismissed.

CONCLUSION

Plaintiffs memorandum is woefully inadequate. Plaintiff's memorandum fails to properly and accurately cite to the record. The Affidavit is deficient on its face. Whether a duty exists is a question of law. However, again Plaintiff's memorandum is deficient. Ordinarily whether a party has been negligent is a question of fact. Summary judgment is inappropriate when there are genuine issues of material fact which are in dispute. Accordingly, the Court must deny Check City's summary judgment motion.

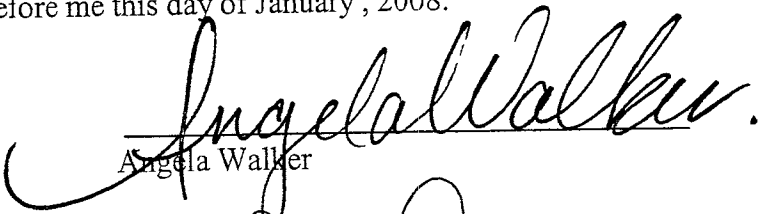
DATED this 16 day of January, 2008.

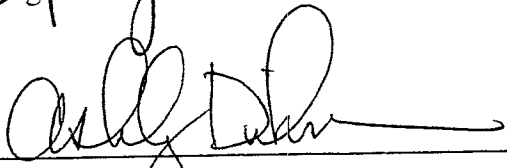


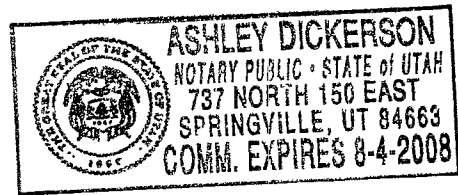
Steven F. Allred
Attorney for L & T

its customers. (Affidavit, paragraphs 4 and 6).

SUBSCRIBED AND SWORN to before me this day of January , 2008.


Angela Walker

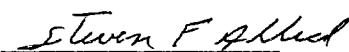

Notary Public



CERTIFICATE OF SERVICE

I, Steven F. Allred, hereby certify that on the 18 day of January, 2008, I personally mailed the foregoing proposed **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT** by depositing a copy thereof in the United States mail, postage prepaid, addressed as follows:

Tyler S. Young, Esq.
YOUNG, KESTER & PETRO
75 South 300 West
Provo, Utah 84601


Steven F. Allred

FILE COPY

UTAH COUNTY, STATE OF UTAH

JUDGE: Fred D. Howard

1. I am of age and am competent to testify in a court of law if necessary.
2. Since May 6, 1998, I have been employed by L & T Enterprises, Inc., doing business as L & T Construction. (Hereinafter "L & T"). My title at L & T was initially Accounts Payable Manager (hereinafter "Manager") until about 2001. Thereafter, my title was Manager and Assistant to the Estimators, which is the title, which I currently hold.
3. In my capacity as Manager about February 2004, I noticed a lien release irregularity and began investigating certain transactions involving Trent Mortenson doing business as TJS Mechanical, (hereinafter "TJS") and TJS's plumbing supplier, Familian Pipe (hereinafter "Familian") and L & T. Since November, 1999, TJS had been a subcontractor of L& T on various construction sites.
4. In conjunction with my investigation of TJS I prepared a Time Line of Events for TJS a copy of which is attached hereto as Exhibit "A."
5. Some of the most relevant events, which I have ascertained as a result of my investigation of TJS, are as follows.
6. Alex Trent Mortensen, doing business as TJS Mechanical Inc., (hereinafter "TJS") is an individual, who began subcontracting with L & T about November 1999.
7. TJS was employed by L & T as a plumbing subcontractor on approximately fifty-four (54) separate and distinct L & T jobs thereafter.
8. In conjunction with the issuance of the Checks from L & T to TJS and its plumbing supplier, Familian, Familian would routinely prepare and execute a lien release(s). (Hereinafter "Releases"). A sample Release is attached hereto as Exhibit "B").
9. TJS typically would obtain a Release from Familian and then in some instances,

unilaterally alter, change and or modify the Release either as to amounts and/or dates and then give the Release to L & T.


10. On or about April 30, 2004, as a result of my investigation, I, on behalf of L & T prepared and executed an Affidavit of Fraud/Forgery (hereinafter "Affidavit") and sent it to Zion's Bank. A true and correct copy of the Affidavit is attached hereto as Exhibit "D."

11. On or about July 30, 2004, L & T paid Familian the sum of \$39, 900.34 because L & T determined, in part, that this was the amount which Familian had been shortchanged given TJS's alteration of the Releases.

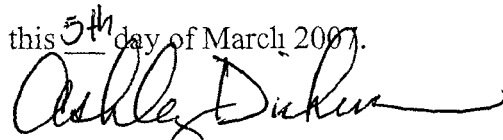
12. Zion's Bank sent to L & T a monthly statement (hereinafter "Statement") for the time period involved including but said Statement reveals nothing about the endorsements on the back of checks or the alteration of Releases.

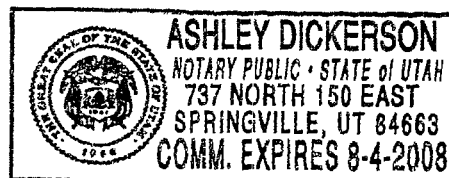
13. L & T did not at the time and does not routinely receive copies of the back of its checks from its bank, Zion's, with its monthly Statement unless special request was made by L & T which request L & T made to Zion's by fax on April 9, 2004.

DATED this 5TH day of March 2007.


Angela Walker

SUBSCRIBED AND SWORN to before me this 5th day of March 2007.


Notary Public



RECEIVED LIEN RELEASE FROM FNW FOR PG CONDOS BLDG 6 FOR \$1,153.08 TJS NEVER GAVE ME THIS COPY.
RECEIVED LIEN RELEASE FROM FNW FOR PG CONDOS BLDG 3 FOR \$9,477.84 TJS GAVE ME ONE THAT WAS FOR \$1,477.84
RECEIVED LIEN RELEASE FROM FNW FOR PG CONDOS BLDG 4 FOR \$23,181.29 TJS GAVE ME ONE THAT WAS FOR \$3,181.29
RECEIVED LIEN RELEASE FROM FNW FOR PG CONDOS BLDG 5 FOR \$10,419.74 TJS GAVE ME ONE THAT WAS FOR THE SAM
FNW FAXED OVER LIST OF JOBS AND AMOUNTS OWNING ON EACH JOB.
PURCHASE ORDER WRITTEN BY L&T TO TJS FOR EXTRAS AT DENNIS RESIDENCE
TJS & L&T ENTERED INTO A CONTRACT FOR DENNIS' RESIDENCE FOR \$13,640.00
SENT LETTER TO FNW REQUESTING ALL L&T JOBS ON TJS MECHANICAL'S ACCOUNT BE CLOSED PROOF OF DELIVERY TIC
FNW PRINTS A COMPLETE INVOICE INQUIRY REPORT FOR TJS MECHANICAL
STARTED A SPREADSHEET TO FIGURE OUT HOW MUCH THAT TJS OWED ON OUR PROJECTS (SEE TJS PRE-LIEN)
STARTED ANOTHER SPREADSHEET FOR LEW TO FIGURE WHAT OUR LOSSES WERE. (SEE TJS PRE-LIEN 2)
SENT A LIST OF CHECKS TO MARIANNE TO VERIFY THAT SHE HAD RECEIVED THESE JOINT CHECKS
RECEIVED A LIST OF CHECKS THAT MARIANNE WANTED TO SEE CANCELED CHECKS
SENT FAX TO ZIONS BANK REQUESTING CANCELLED CHECKS THAT WERE IN QUESTION
RESEARCHING ALL OF TJS MECHANICALS CHECKS
RECEIVED DRAFT FROM STEVEN ALLRED TO ZIONS BANK FOR IMPROPER DEBIT TO L&T 'S ACCOUNT
RESEARCHING ALL OF TJS MECHANICALS CHECKS & PRINTING REPORTS ON JOBS (SEE ZIONS BANKS JOINT CHECKS)
RESEARCHING ALL OF TJS MECHANICALS CHECKS & PRINTING REPORTS ON JOBS (SEE FARWEST BANKS JOINT CHECKS)
SENT POSSIBLE CHECKS TO FARWEST BANK NOTIFYING THEM OF POSSIBLE FRAUDULENT CHECKS (SEE BAD CHECKS)
SENT JERRY GUYMON AT ZIONS BANK A LIST OF CHECKS THAT DID NOT HAVE 2ND SIGNATURES
SENT NOTICE OF LIEN WAIVERS TO FARWEST BANK
SENT BRIAN SNELSON A COPY OF THE CHECKS FOR TOWN CENTER AND THE AFFIDAVIT DECLARING FORGERY
CREATED A SPREADSHEET OF ALL THE OUTSTANDING INVOICES FOR TJS MECHANICAL FROM FNW (SEE FNW INVOICES)
SENT MARIANNE 16 CANCELLED CHECKS THAT WERE IN QUESTION TOTALING \$39,748.72 AND DATES RANGES FROM 03-31
FILLED OUT FORGERY CHECKLIST AND AFFIDAVIT OF FRAUD/FORGERY AND SENT TO ZIONS BANK
CREATED A SPREADSHEET OF ALL THE OUTSTANDING INVOICES IN JOB DETAIL FOR TJS MECHANICAL FROM FNW (SEE FN
CREATED A OUTLINE OF MEETING WITH FNW (SEE FNW MTG 5-6-04)
MET WITH FNW TO FIGURE OUT THEIR ACCOUNT
RECONCILIATION OF DENNIS RESIDENCE TRYING TO FIGURE OUT OUR BALANCE TO COMPLETE (SEE DENNIS RECONCILE)
CREATED A SPREADSHEET FOR TOWN CENTER AND DENNIS LOSS ON JOB. (SEE INDIVIDUAL JOBS)

ZIONS BANK SENT LETTER TO KEY BANK REQUESTING CHECKS BE CUT FOR THE AMOUNTS OF THE FORGERY CHECKS
KEY BANK CUT CHECKS TO ZIONS FIRST NATIONAL BANK FOR THE EXACT AMOUNTS OF THE CHECKS
L&T RECEIVED THE COPY OF THE LETTER TO KEY BANK AND A COPY OF ALL THE CHECKS THAT WERE CUT TO ZIONS FOR
TJS MECHANICAL AND JANA LEE MORTENSEN FILED THEIR PETITION FOR RELIEF UNDER CHAPTER 7 OF THE US BANKRUPT
RECEIVED IN MAIL (5) NOTICES OF DISHONORED CHECKS FROM CHECK CITY LETTER DATED 07-28-2004
SENT STEVEN ALLRED A FAX OF THE NOTICE FROM CHECK CITY
PREPARED CONDITIONAL FINAL RELEASE
PRINTED COMPUTER EASE PRINTOUT OF WHAT INVOICES WERE STILL HOLDING FOR TJS MECHANICAL
LETTER TO CHECK CITY FROM STEVEN ALLRED REGARDING NOTICES SENT TO L&T BY CHECK CITY ON 07-07-04
BACKCHARGE TO TJS MECHANICAL FOR PLATINUM PLUMBING TO FIX AND FINISH DENNIS RESIDENCE (\$4320)
SENT FNW A LIEN RELEASE FOR TOWN CENTER
RECEIVED SIGNED CONDITIONAL FINAL LIEN RELEASE FROM FERGUSON FOR TOWN CENTER IN THE AMOUNT OF 39,900.34
RECEIVED FAX FROM VICKIE REQUESTING THE CHECK FOR THEIR FISCAL YEAR END
PAID FERGUSON 39900.34 CHECK #52823 DATED 7-30-04
FERGUSON CASHED THEIR JOINT CHECK W/ OUT TJS' SIGNATURE
RECEIVED LETTER FROM KENNETH A RUSHTON BANKRUPTCY LAWYER FOR TJS MECHANICAL
SENT LETTER TO STEVEN ALLRED ABOUT TJS MECHANICAL BANKRUPTCY
SENT STEVEN ALLRED THE 2 LIEN RELEASED THAT WERE MANIPULATED
ADVERSARY PROCEEDING - COMPLAINT OBJECTING TO DISCHARGE OF DEBTORS
FILED WITH US BANKRUPTCY COURT THE ADVERSARY L&T VS MORTENSEN PD \$150.00
MORE RESEARCH WITH WHAT WE PAID TJS MECHANICAL (SEE INVOICES PAID)
CRAIG'S TIME TO FIX TRENTS PROBLEMS ON THE JOB SITE. 2.5 HRS AND 1.5 SHOULD HAVE BACK CHARGED TO TRENT
CREATED A SPREADSHEET ON THE LOSS FOR TOWN CENTER (SEE TOWNCENTER RECONCILIATION)
EVALUATION THE LOSS ON TOWN CENTER AND RECONCILE THE ACCOUNT
HAD TO CLEAR UP TJS MECHANICAL'S ACCOUNT WROTE UP BACKCHARGES TO CLEAR OUT ACCOUNTS PAYABLES
CALL FROM CHECK CITY INQUIRING WHY WE HAVE NOT PAID THEM.
CORRESPONDENCE VIA EMAIL BETWEEN STEVEN ALLRED AND ANGELA WALKER REGARDING CHECK CITY CALL
LETTER DRAFTED FOR A SECOND TIME BY STEVEN ALLRED REGARDING NOTICES OF DISHONORED CHECKS
SENT FAX TO ROSIE AT CHECK CITY LETTER OF STEVEN ALLRED'S REPLY



Regional Office
255 West Cottage Avenue
Sandy, UT 84070

(801) 569-3700
Fax: (801) 569-0300
www.familianow.com

Dated: 3-16-04
Project Owner: LRT Construction
Project General: LRT Construction
Materials Supplied To: TJS Mechanical
Project Name: HS Condos Bldg 3
Supplier: Familian Northwest, Inc. (hereinafter referred to as Familian)

NOTICE OF LIEN WAIVER

~~2~~ Conditional Lien Waiver

The undersigned does hereby acknowledge that upon receipt by Familian of a check from TJS Mechanical in the sum of \$ 9,477.84 and when the check has been properly endorsed and has been paid by the bank on which it is drawn, Familian will release any mechanic's lien, stop notice, equitable lien, or material bond right that Familian has on the above designated project through 2-10-04.

☐ Non-Noticed Unconditional Lien Waiver

_____, hereinafter referred to as the Contractor, states that they have provided product for the above-designated project. A review of Familian's records shows no "Notice of Right to Lien", nor any intent to claim a right to lien for materials sold to the Contractor on the above-designated project, as of this date. The undersigned hereby acknowledges that Familian does unconditionally release any mechanic's lien, stop notice, equitable lien, or material bond rights on product purchased by the Contractor, for the above-designated project, as of this date.

2. Unconditional Lien Waiver

The undersigned does hereby acknowledge that Familian has been paid and has received a progress payment in the sum of \$_____ for materials supplied to _____ and does hereby release any mechanic's lien, stop notice, equitable lien, or material bond right that Familian has on the above-designated project through _____.

g. Unconditional Waiver and Release Upon Final Payment

The undersigned has been paid in full for all materials furnished on the above-designated project and does hereby waive and release any right to a mechanic's lien, stop notice, equitable lien, or right against a labor or material bond subject to the full payment to Familian by the bank(s) on which all payments on the above-designated project were drawn.

Familian Northwest, Inc.

By: Marianne Maddox
Marianne Maddox
Regional Credit Manager

Exhibit "B"

FORGERY CHECKLIST

Instructions

- 1 This form is to be completed by branch personnel, preferably by a Customer Service Manager or Assistant Manager
 - 2 Use this form to 1) Prevent further losses to the checking account by closure or withdrawal of the account balance on the online system until stops can be placed, and 2) Alert Bankcard of stolen cards
- Read Zions Forged, Stolen or Altered Checks Policy (# 325) for reimbursement procedures Call Checking Account Services (801) 974-8832 for "return without entry" assistance Use the reverse side of this form to provide additional information if necessary

Date	4-30-04	Branch:	WASATCH 041	Employee	
Client	LET CONSTRUCTION	Account Number		Phone	226-0090
Check #		Or Low #		To High #	(Amount) \$19,308.12

NATURE OF FORGERY

Forged maker	<input checked="" type="checkbox"/>	Forged Endorsement	<input type="checkbox"/>	Altered Payee	<input type="checkbox"/>	Other	<input type="checkbox"/>
Check was cashed at	Branch Number		Teller # & Name				
Check was cashed at business							(Business Name & Address)

ACTIONS TAKEN (Please Complete All Items)

Zions Security notified by	041	Branch		CAS		Other	
Police notified by		Client		Branch		Police Agency	
Case Number		Assigned Detective		Police Station:			
Account closed (Check numbers cannot be identified)	<input checked="" type="checkbox"/>	Account brought to zero balance	<input checked="" type="checkbox"/>				
Affidavits completed, signed, and notarized for each check	<input checked="" type="checkbox"/>						
Stop/Alerts set up for Date	4/30/04	Check Numbers	#51167, 51168, 51459, 51747, 51765, 51766				
If no stops or alerts have been set up, explain why							

HOW FORGERY WAS DISCOVERED

Checks came in monthly statement Reported within 14 days of date sent	<input checked="" type="checkbox"/>	Yes	<input type="checkbox"/>	No
Account became overdrawn	<input checked="" type="checkbox"/>			
Burglary	<input checked="" type="checkbox"/>	Bankcards stolen	Notify Bankcard Department, (801) 974-8822	
		PIN stolen	Notify CIF, (801) 974-8845	ATM (801) 974-8949
		Personal Identification stolen (explain)		

FORGER'S SUSPECTED IDENTITY

Family member — Name & Relationship		Age	
Personal acquaintance — Name			
Employee — Name		Still with company?	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>
Other — Explain	SUBCONTRACTOR - TJS Mechanical		
Who has access to checks?	Only Authorized Staff		
Were they kept in a locked area?	<input checked="" type="checkbox"/>	Yes	No
Are check signatures similar to those on account signature cards?	<input type="checkbox"/>	Yes	No

NOTE:

Please send this form with the original checks and affidavits to
Loss Prevention, UT SLSC 0819. Keep a copy for your files.
Do not reimburse the client until you receive Loss Prevention approval.

APPROVED FOR REIMBURSEMENT:

Loss Prevention Approval

In this Affidavit the words "I", "me" and "my" mean each and all client(s) who give evidence and sign this affidavit.

CLIENT INFORMATION

Name(s) L3T ENTERPRISES
 Address 215 SOUTH OREM BLVD OREM UTAH 84058
 Phone 801-226-0080
Area Code City State Zip

DESCRIPTION OF CHECK/SAVINGS WITHDRAWAL

The check/savings withdrawal which is the subject of this Affidavit contains the following information

Name/Title of Account L3T ENTERPRISES
 Maker(s) L3T ENTERPRISES
 Dated 12/11/03 Check Number 051167 Dollars (\$ \$265.62)
 Check Drawn On ZIONS BANK ACCOUNT # 124000054
 Check Payable to TJS Mechanical and FAMILIAN NORTH WEST INC
 Check Endorser(s) _____

UNAUTHORIZED DEBIT

- ☐ The transaction listed above was not authorized by myself or any other signers on the account. I have received none of the proceeds from this transaction.

SIGNATURE FORGERY

- ☐ The signature on the above check/savings withdrawal is a forgery. I did not sign this check/savings withdrawal, nor did I give anyone permission to sign this check/savings withdrawal. I have received none of the proceeds of this check/savings withdrawal.

ENDORSEMENT FORGERY

- ☒ The endorsement on the above check is a forgery. This check is made payable to me but the endorsement on the check is not my signature, nor did I give anyone permission to put my name on the back of the check. I have received none of the proceeds of this check. ONLY ONE ENDORSEMENT. NO 2ND SIGNATURE FROM 2ND PARTY AS LISTED ABOVE.

ALTERATION

- ☐ I signed the above check but the information on this check has been altered by someone other than myself. I did not give anyone permission to alter this check nor have I received any of the proceeds of this check. This check originally contained the following information:

Dated _____ Amount \$ _____ Payable to _____

COUNTERFEIT

- ☐ The above check is a printed, photocopied, or other reproduction of a check/negotiable instrument not authorized or issued by the Bank or myself drawn against my account.

I agree to cooperate with Zions Bank in pursuing collection efforts which may be initiated by Zions Bank including but not limited to participating in any criminal prosecution which may be initiated by any proper authority. I acknowledge that Zions Bank may refuse any reimbursement should I refuse to cooperate with efforts to pursue appropriate action requested by Zions Bank against any perpetrator of the forgery or alteration.

I certify that the information on this Affidavit is correct and I have received a copy of this Affidavit.

Subscribed and sworn before me

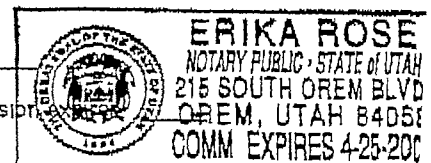
This 30th day of April 2004 Client's Signature

4/30/2004
Date

Notary Public Erika Rose

County Utah State of Utah

My commission expires



In this Affidavit the words "I", "me" and "my" mean each and all client(s) who give evidence and sign this affidavit.

CLIENT INFORMATION

Name(s): L3T ENTERPRISES
 Address: 215 SOUTH OREM BLVD OREM UTAH 84058
Street City State Zip
 Phone: 801-226-0080
Area Code

DESCRIPTION OF CHECK/SAVINGS WITHDRAWAL

The check/savings withdrawal which is the subject of this Affidavit contains the following information:

Name/Title of Account: L3T ENTERPRISES
 Maker(s): L3T ENTERPRISES
 Dated: 12/11/2003 Check Number: 051168 Dollars (\$ 265.62)
 Check Drawn On: ZIONS BANK ACCOUNT # 124000054
 Check Payable to: TJS MECHANICAL and FAMILIAN NORTH WEST, INC.
 Check Endorser(s): _____

UNAUTHORIZED DEBIT

- ☐ The transaction listed above was not authorized by myself or any other signers on the account. I have received none of the proceeds from this transaction.

SIGNATURE FORGERY

- ☐ The signature on the above check/savings withdrawal is a forgery. I did not sign this check/savings withdrawal, nor did I give anyone permission to sign this check/savings withdrawal. I have received none of the proceeds of this check/savings withdrawal.

ENDORSEMENT FORGERY

- ☒ The endorsement on the above check is a forgery. This check is made payable to me but the endorsement on the check is not my signature, nor did I give anyone permission to put my name on the back of the check. I have received none of the proceeds of this check. ONLY ONE ENDORSEMENT. NO 2ND SIGNATURE FROM 2ND

ALTERATION

PARTY AS LISTED ABOVE.

- ☐ I signed the above check but the information on this check has been altered by someone other than myself. I did not give anyone permission to alter this check, nor have I received any of the proceeds of this check. This check originally contained the following information:

Dated: _____ Amount \$ _____ Payable to: _____

COUNTERFEIT

- ☐ The above check is a printed, photocopied, or other reproduction of a check/negotiable instrument not authorized or issued by the Bank or myself drawn against my account.

I agree to cooperate with Zions Bank in pursuing collection efforts which may be initiated by Zions Bank, including but not limited to participating in any criminal prosecution which may be initiated by any proper authority. I acknowledge that Zions Bank may refuse any reimbursement should I refuse to cooperate with efforts to pursue appropriate action requested by Zions Bank against any perpetrator of the forgery or alteration.

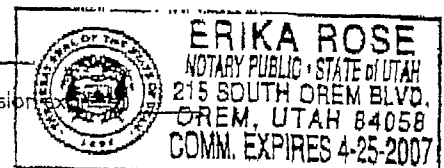
I certify that the information on this Affidavit is correct and I have received a copy of this Affidavit.

Subscribed and sworn before me: _____

This 30th day of April 2004 Client's Signature _____

Notary Public _____

County Utah State of Utah My commission expires _____



In this Affidavit the words 'I', 'me' and 'my' mean each and all client(s) who give evidence and sign this affidavit

CLIENT INFORMATION

Name(s) L3T ENTERPRISES
 Address 215 SOUTH OREM BLVD OREM UTAH 84058
 Phone 801-226-0080
Area Code City State Zip

DESCRIPTION OF CHECK/SAVINGS WITHDRAWAL

The check/savings withdrawal which is the subject of this Affidavit contains the following information:

Name/Title of Account L3T ENTERPRISES
 Maker(s) L3T ENTERPRISES
 Dated 12/31/2003 Check Number 051459 Dollars (\$ 4,207.70)
 Check Drawn On ZIONS BANK ACCOUNT # 124000054
 Check Payable to TJS MECHANICAL and FAMILIAN NORTHWEST, INC.
 Check Endorser(s) _____

UNAUTHORIZED DEBIT

- ☐ The transaction listed above was not authorized by myself or any other signers on the account. I have received none of the proceeds from this transaction.

SIGNATURE FORGERY

- ☐ The signature on the above check/savings withdrawal is a forgery. I did not sign this check/savings withdrawal nor did I give anyone permission to sign this check/savings withdrawal. I have received none of the proceeds of this check/savings withdrawal.

ENDORSEMENT FORGERY

- ☒ The endorsement on the above check is a forgery. This check is made payable to me but the endorsement on the check is not my signature, nor did I give anyone permission to put my name on the back of the check. I have received none of the proceeds of this check. ONLY ONE ENDORSEMENT. NO 2ND SIGNATURE FROM

ALTERATION

2ND PARTY AS LISTED ABOVE

- ☐ I signed the above check but the information on this check has been altered by someone other than myself. I did not give anyone permission to alter this check, nor have I received any of the proceeds of this check. This check originally contained the following information:

Dated _____ Amount \$ _____ Payable to _____

COUNTERFEIT

- ☐ The above check is a printed, photocopied, or other reproduction of a check/negotiable instrument not authorized or issued by the Bank or myself drawn against my account.

I agree to cooperate with Zions Bank in pursuing collection efforts which may be initiated by Zions Bank, including but not limited to participating in any criminal prosecution which may be initiated by any proper authority. I acknowledge that Zions Bank may refuse any reimbursement should I refuse to cooperate with efforts to pursue appropriate action requested by Zions Bank against any perpetrator of the forgery or alteration.

I certify that the information on this Affidavit is correct and I have received a copy of this Affidavit.

Subscribed and sworn before me

This 30th day of April 20 04 Client's Signature _____

4/30/2004
Date

Notary Public Erika Rose

County Utah State of Utah

My commission expires _____



ERIKA ROSE
 NOTARY PUBLIC - STATE OF UTAH
 215 SOUTH OREM BLVD
 OREM, UTAH 84058
 COMM. EXPIRES 4-25-2005

In this Affidavit the words "I", "me" and "my" mean each and all client(s) who give evidence and sign this affidavit.

CLIENT INFORMATION

Name(s): L3T ENTERPRISES
Address: 215 SOUTH OREM BLVD OREM UTAH 84058
Phone: 801-226-0080
Street City State Zip
Area Code

DESCRIPTION OF CHECK/SAVINGS WITHDRAWAL

The check/savings withdrawal which is the subject of this Affidavit contains the following information:

Name/Title of Account L3T ENTERPRISES
Maker(s) L3T ENTERPRISES
Dated: 2/13/2004 Check Number: 051747 Dollars (\$ 2,098.68)
Check Drawn On: ZIONS BANK ACCOUNT # 124000054
Check Payable to: TJS MECHANICAL and FAMILIAN NORTHWEST INC
Check Endorser(s): _____

UNAUTHORIZED DEBIT

- ☐ The transaction listed above was not authorized by myself or any other signers on the account. I have received none of the proceeds from this transaction.

SIGNATURE FORGERY

- ☐ The signature on the above check/savings withdrawal is a forgery. I did not sign this check/savings withdrawal, nor did I give anyone permission to sign this check/savings withdrawal. I have received none of the proceeds of this check/savings withdrawal.

ENDORSEMENT FORGERY

- ☒ The endorsement on the above check is a forgery. This check is made payable to me but the endorsement on the check is not my signature, nor did I give anyone permission to put my name on the back of the check. I have received none of the proceeds of this check.

ONLY ONE ENDORSEMENT. NO 2ND SIGNATURE FROM
2ND PARTY AS LISTED ABOVE.

ALTERATION

- ☐ I signed the above check but the information on this check has been altered by someone other than myself. I did not give anyone permission to alter this check, nor have I received any of the proceeds of this check. This check originally contained the following information:

Dated _____ Amount \$ _____ Payable to: _____

COUNTERFEIT

- ☐ The above check is a printed, photocopied, or other reproduction of a check/negotiable instrument not authorized or issued by the Bank or myself drawn against my account.

I agree to cooperate with Zions Bank in pursuing collection efforts which may be initiated by Zions Bank, including but not limited to participating in any criminal prosecution which may be initiated by any proper authority. I acknowledge that Zions Bank may refuse any reimbursement should I refuse to cooperate with efforts to pursue appropriate action requested by Zions Bank against any perpetrator of the forgery or alteration.

I certify that the information on this Affidavit is correct and I have received a copy of this Affidavit.

Subscribed and sworn before me: [Signature] Client's Signature

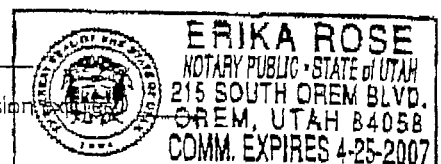
4/30/2004
Date

This 30th day of April 2004

Notary Public Erika Rose

County Utah State of Utah

My commission _____



Zions Bank**AFFIDAVIT OF FRAUD/FORGERY**

In this Affidavit the words "I", "me" and "my" mean each and all client(s) who give evidence and sign this affidavit.

CLIENT INFORMATION

Name(s): L3T ENTERPRISES
 Address: 215 SOUTH OREM BLVD OREM UTAH 84058
 Phone: 801-226-0080 Area Code OREM City UTAH State 84058 Zip

DESCRIPTION OF CHECK/SAVINGS WITHDRAWAL

The check/savings withdrawal which is the subject of this Affidavit contains the following information:

Name/Title of Account L3T ENTERPRISES
 Maker(s) L3T ENTERPRISES
 Dated, 2/19/2004 Check Number 051765 Dollars (\$ 7477.84)
 Check Drawn On ZIONS BANK ACCOUNT # 124000054
 Check Payable to: TJS MECHANICAL INC and FAMILIAN NORTHWEST INC
 Check Endorser(s): _____

UNAUTHORIZED DEBIT

- ☐ The transaction listed above was not authorized by myself or any other signers on the account. I have received none of the proceeds from this transaction.

SIGNATURE FORGERY

- ☐ The signature on the above check/savings withdrawal is a forgery. I did not sign this check/savings withdrawal, nor did I give anyone permission to sign this check/savings withdrawal. I have received none of the proceeds of this check/savings withdrawal.

ENDORSEMENT FORGERY

- ☒ The endorsement on the above check is a forgery. This check is made payable to me but the endorsement on the check is not my signature, nor did I give anyone permission to put my name on the back of the check. I have received none of the proceeds of this check. ONLY ONE ENDORSEMENT. NO 2ND SIGNATURE FROM 2ND PARTY AS LISTED ABOVE.

ALTERATION

- ☐ I signed the above check but the information on this check has been altered by someone other than myself. I did not give anyone permission to alter this check, nor have I received any of the proceeds of this check. This check originally contained the following information:

Dated _____ Amount \$ _____ Payable to: _____

COUNTERFEIT

- ☐ The above check is a printed, photocopied, or other reproduction of a check/negotiable instrument not authorized or issued by the Bank or myself drawn against my account.

I agree to cooperate with Zions Bank in pursuing collection efforts which may be initiated by Zions Bank, including but not limited to participating in any criminal prosecution which may be initiated by any proper authority. I acknowledge that Zions Bank may refuse any reimbursement should I refuse to cooperate with efforts to pursue appropriate action requested by Zions Bank against any perpetrator of the forgery or alteration.

I certify that the information on this Affidavit is correct and I have received a copy of this Affidavit.

Subscribed and sworn before me

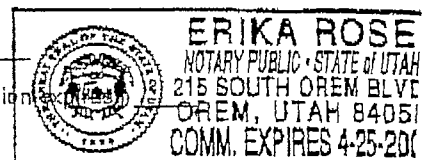
This 30th day of April 2004 [Signature] Client's Signature

4/30/2004 Date

Notary Public

ERIKA ROSE County Utah State of Utah

My commission expires



In this Affidavit the words "I", "me" and "my" mean each and all client(s) who give evidence and sign this affidavit.

CLIENT INFORMATION

Name(s) L3T ENTERPRISES
 Address 215 SOUTH OREM BLVD OREM UTAH 84058
Street City State Zip
 Phone 801-226-0080
Area Code

DESCRIPTION OF CHECK/SAVINGS WITHDRAWAL

The check/savings withdrawal which is the subject of this Affidavit contains the following information.

Name/Title of Account L3T ENTERPRISES
 Maker(s) L3T ENTERPRISES
 Dated 2/19/2004 Check Number 051766 Dollars (\$4,992.66)
 Check Drawn On ZIONS BANK ACCOUNT # 124000054
 Check Payable to TJS MECHANICAL INC and FAMILIAN NORTHWEST INC.
 Check Endorser(s) _____

UNAUTHORIZED DEBIT

- ☐ The transaction listed above was not authorized by myself or any other signers on the account. I have received none of the proceeds from this transaction.

SIGNATURE FORGERY

- ☐ The signature on the above check/savings withdrawal is a forgery. I did not sign this check/savings withdrawal, nor did I give anyone permission to sign this check/savings withdrawal. I have received none of the proceeds of this check/savings withdrawal.

ENDORSEMENT FORGERY

- ☒ The endorsement on the above check is a forgery. This check is made payable to me but the endorsement on the check is not my signature, nor did I give anyone permission to put my name on the back of the check. I have received none of the proceeds of this check. ONLY ONE ENDORSEMENT. NO 2ND SIGNATURE FROM 2ND PARTY AS LISTED ABOVE.

ALTERATION

- ☐ I signed the above check but the information on this check has been altered by someone other than myself. I did not give anyone permission to alter this check, nor have I received any of the proceeds of this check. This check originally contained the following information:

Dated _____ Amount \$ _____ Payable to: _____

COUNTERFEIT

- ☐ The above check is a printed, photocopied, or other reproduction of a check/negotiable instrument not authorized or issued by the Bank or myself drawn against my account.

I agree to cooperate with Zions Bank in pursuing collection efforts which may be initiated by Zions Bank, including but not limited to participating in any criminal prosecution which may be initiated by any proper authority. I acknowledge that Zions Bank may refuse any reimbursement should I refuse to cooperate with efforts to pursue appropriate action requested by Zions Bank against any perpetrator of the forgery or alteration.

I certify that the information on this Affidavit is correct and I have received a copy of this Affidavit.

Subscribed and sworn before me: _____

This 30th day of April 2004 Client's Signature _____

Notary Public Erika Rose

County Utah

State of Utah

My commission expires _____

